Supreme Court, U.S.
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No. 04-778

IN THE

Supreme Court of the United States

PAN AMERICAN ENERGY, LLC,

Petitioner,

v.

CANDLEWOOD TIMBER GROUP, LLC, AND FORESTAL SANTA BARBARA SRL,

Respondents.

On Petition for a Writ of Certiorari To The Supreme Court of Delaware

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Stripped of its sarcasm, respondents' brief in opposition is nothing more than an evasion of the important federal questions raised in the petition for certiorari. Respondents' jurisdictional objections are unsound. The Delaware Supreme Court's decision by its terms wholly excludes any consideration of foreign sovereign interests in determining whether an American state court may exercise jurisdiction over a foreign dispute. Pet. App. 15a-16a, 18a; Pet. 10. The federal law of foreign relations necessarily governs that question, and that question was passed on below. That is all that is required for this Court's jurisdiction; it matters not whether the court below expressly framed the issue as one of federal law. Nor is there a lack of finality. If the state court's ruling is reversed, respondents' complaint must be dismissed (as the Delaware Court of Chancery had ruled). Accordingly, this case falls well within the fourth rule of pragmatic finality under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Respondents' position, that any ruling embedded within a state court's denial of a *forum non conveniens* motion is *ipso facto* insulated from this Court's review, is unsupported by this Court's precedents and would result in the wholesale abdication of the Court's critical role of ensuring that the exercise of state court jurisdiction does not trench upon the foreign relations of the United States.

Their flawed jurisdictional objections aside, respondents can muster little argument against review. Other than (erroneously) to deny that the court below decided a federal question, respondents have no answer to Pan American's showing of a conflict in the circuits about whether American courts must weigh foreign sovereign interests in declining jurisdiction. Pet. 15-19; *infra* at 7-8. There can be little doubt of the importance of this issue in a global economy where plaintiffs increasingly resort to American courts for resolution of foreign disputes. The paramount importance of

this issue to foreign governments is underscored by the participation of the Republic of Argentina as *amicus curiae* urging review.[1] This Court should grant the petition.

I. THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL.

1. Respondents do not seriously contest the merits of Pan American's petition. See Opp. 12 (declining to "explore here the allegedly 'mature' conflict now pending in the lower courts"). Rather, they assert that this Court lacks jurisdiction because the questions decided below "were all framed solely in terms of Delaware law." *Id.* at 7. But these jurisdictional concerns are baseless because the Delaware Supreme Court did, in fact, pass upon an important federal question.

The Delaware Supreme Court held that foreign sovereign interests "have no logical relevance" to whether a state court would exercise jurisdiction over the Argentine dispute, which depends only upon the convenience to the private parties of litigating in Delaware. Pet. App. 16a; Pet. 14. The propriety of state court jurisdiction that trenches on foreign sovereign interests, however, is unquestionably governed by federal law. "The basic choice regarding the competence and function of the Judiciary and National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964). Accordingly, "matters bearing on the Nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'" *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quoting *Sabbatino*, 376 U.S. at 425).

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[1] The Republic of Argentina's *amicus* brief also dispels respondents' claim that the Argentine government was unaware that respondents had dropped some of their most intrusive claims for injunctive relief, or that doing so in any way mitigated the threat to Argentina's sovereign interests. *See* Opp. 2, 12-13; *cf.* Amicus Br. 6 n.2; *see generally* Pet. 8.

Indeed, respondents do not contest that federal law must govern this question. They raise concerns (answered below) regarding the content of a federal law rule, Opp. 10-11, and argue that federal common law rarely should be invoked, *id.* at 12 n.6, but they do not, and cannot, argue that federal law does not govern questions of state court impairment of foreign sovereign interests. It is unthinkable that this Court has no power to curtail the exercise of state court jurisdiction that jeopardizes the Nation's foreign relations.

Respondents' jurisdictional arguments rest solely on the Delaware court's framing of the issue in state law terms. But it is within this Court's "province to inquire not only whether [a federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support." *Howlett* v. *Rose*, 496 U.S. 356, 366 (1990) (quotation marks omitted). Indeed, this Court must frequently look behind the asserted state law grounds for a decision whenever "it is urged that the decision of the state court rests upon a nonfederal ground." *Abie State Bank* v. *Weaver*, 282 U.S. 765, 773 (1931). This is because it remains necessary for this Court "to ascertain for itself . . . whether the asserted nonfederal ground independently and adequately supports the judgment." *Id.* Because the Delaware Supreme Court's jurisdictional ruling is a question of federal law, this Court has jurisdiction here.

Respondents' further argument that petitioner did not present this federal question to the Delaware Supreme Court is both irrelevant and disingenuous. This Court will exercise jurisdiction if the federal question was either "pressed or passed upon in the state court." *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985); cf. *Illinois* v. *Gates*, 462 U.S. 213, 218-19 (1983) (leaving open the question whether this rule is jurisdictional or prudential). As noted above, the Delaware Supreme Court below did pass upon a federal question. Respondents fail to heed the disjunctive nature of the

"pressed *or* passed upon" test, and the "'elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided.'" *Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979) (omission in original); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."); Robert L. Stern et al., *Supreme Court Practice* § 3.19, at 185 (8th ed. 2002) ("Once it is clear that the highest state court has actually passed on the federal question, . . . [a]n irrebuttable presumption is created that the federal question was timely and properly raised."). Moreover, the argument is disingenuous because the Court of Chancery had dismissed the complaint on state law grounds, and the federal question did not arise until the Delaware Supreme Court announced the novel rule that foreign sovereign interests are "legally irrelevant" to a determination of whether a state court will exercise jurisdiction. Pet. App. 15a. That holding embodies a clear rule of decision that arises under federal law and warrants this Court's review.

2. Respondents' finality argument is similarly unavailing. The petition fully described how the judgment below satisfies the jurisdictional finality requirement of 28 U.S.C. § 1257, for here "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come," *Cox Broadcasting*, 420 U.S. at 482-83. See Pet. 11-12 & n. 1. Respondents' primary objection to finality – that there was no federal issue finally decided in the case, Opp. 9 – is wrong for the reasons given above. Their secondary objection – that a ruling on the federal question would not preclude "'*further litigation on the relevant cause of action*,'" *id.* (emphasis added) – is likewise untenable. A decision on the federal question in favor of

petitioner will end the case without any litigation on the merits of respondents' tort and contract claims.

Respondents nonetheless suggest that a decision on the federal question would not be preclusive because this Court's disposition of the case "could 'take a number of [other] paths,'" Opp. 9 (alteration in original) (quoting *Nike* v. *Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., concurring)). Justice Stevens's concurrence is inapposite; the federal question at issue in *Nike* was a merits question concerning the test for infringement of commercial speech under the First Amendment. Justice Stevens noted that certain claims might have to be litigated regardless because they did not involve commercial speech, and that some First Amendment standards that the Court could adopt (such as actual malice) would entail factfinding in the litigation of a First Amendment affirmative defense to a state law unfair competition claim. *Nike* v. *Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., concurring). Here, by contrast, there is no possibility of litigation on the merits of respondents' state tort law and contract claims if the federal question of abstention to avoid impairment of federal sovereign interests is resolved in favor of petitioner. Thus, respondents' attempt to distinguish *Cox* is unavailing.

It is clear that the rule announced below – that foreign sovereign interests are irrelevant to a state court's decision to assume jurisdiction, and the plaintiff's choice of forum will be honored unless the defendant can make the "rare" showing that he "will be subjected to overwhelming hardship and inconvenience if required to litigate in [state court]," Pet. App. 15a (internal quotation marks omitted) – cannot be maintained as a rule of federal law, and must be rejected by this Court. The proper federal abstention rule will be decided by this Court on the merits. Respondents fault petitioner for not declaring the metes and bounds of a "one-size-fits-all" federal rule of abstention. Opp. 9-10. There is no need. Under the federal *common law* of foreign relations, this Court

may decide this case on the record before it. What is clear is that federal law requires an American court to dismiss a foreign commercial dispute that: 1) arises on foreign soil; 2) is governed by foreign law; 3) will determine the duties, liabilities, and extraction practices of foreign petroleum producers and foreign surface land owners; and 4) will affect both the foreign nation's production of national energy resources and that nation's revenues. What makes the argument in favor of dismissal overwhelming is the incontrovertible existence of an adequate forum to resolve this dispute. An academic may feel the urge to speculate about broad principles that will apply to every case that may arise in the future, see *id.* at 10, but it is this Court's duty to decide the case before it, and establish the basic principle of foreign relations law that a state court cannot exercise jurisdiction in the circumstances presented in this case. A federal ruling of abstention would unquestionably end the case without further litigation on the merits, and thus this case is squarely within *Cox*.

Respondents also try to shoehorn this case under the doctrine of *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988), a case involving 28 U.S.C. § 1291, whose finality requirements are distinct from those in § 1257. See *Flanagan* v . *United States*, 465 U.S. 259, 265 n.3 (1984). Even putting aside the differences between § 1291 and § 1257, respondents' claim that *Biard* is "quite dispositive" is misplaced. Respondents fail to engage the central point of Pan American's argument: that *Biard* is not controlling because there is no risk that review would enmesh this Court in the merits of the case. As stated in the petition, the Court in *Biard* held that the balancing of the relevant public and private factors in application of ordinary *forum non conveniens* doctrine (such as the location of witnesses and evidence necessary to prove claims and defenses) bore too close a relationship to litigation of the merits to be final under the collateral order doctrine (which is but one grounds for

finality under *Cox*). Pet. 12 n.1; *Biard*, 486 U.S. at 527-29. Petitioner does not ask this Court to conduct the *forum non conveniens* balancing test, which here is a matter of state law, but simply to resolve the federal issue of a state court's duty to abstain from jurisdiction to avoid impairment of foreign sovereign interests. This Court plainly has jurisdiction.

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT ON THE IMPORTANT FEDERAL ISSUE OF WHETHER STATE COURTS MAY EXERCISE JURISDICTION THAT IMPAIRS FOREIGN SOVEREIGN INTERESTS.

1. Its jurisdictional objections overcome, respondents have no basis to oppose certiorari. As noted above, they have no answer to the petition's showing of a significant circuit split on the federal issue decided below. The petition explained how the Delaware Supreme Court rejected the reasoning of the Fifth and Eleventh Circuits, and the Illinois Supreme Court, by concluding that foreign sovereign interests were "legally irrelevant" to the decision of whether to retain jurisdiction. Pet. App. 15a.[2] In doing so, the Delaware

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[2] Respondents remarkably ignore this holding of the Delaware Supreme Court to claim that the state court "gave elaborate consideration to [foreign sovereign] interests," Opp. 12, expressing disbelief that another "approach could be more sensitive to foreign sovereign interests." *Id.* at 13. The passages they cite only deal with the Delaware Supreme Court's erroneous ruling on whether the Argentine courts have exclusive jurisdiction of these claims. *See* Pet. App. 26a-32a. Other courts do not limit the consideration of foreign sovereign interests to whether that nation's courts have formally established exclusive jurisdiction over the dispute in its courts. Moreover, contrary to respondents' claim, petitioner does challenge the exclusive jurisdiction ruling as one of the predicates to a ruling on the federal abstention question. *Id.* at 23a-24a. The nature of foreign jurisdiction is a question of foreign law, but this Court may resolve any issue of foreign or state law that is a predicate to an intelligent resolution of the federal question. *See, e.g.*, *Propper* v. *Clark*, 337 U.S. 472, 490 (1949) (noting that "[w]here a case involves a nonconstitutional federal issue, . . . the necessity for deciding which depends upon the

Supreme Court aligned itself with the Ninth Circuit, which also refuses "to take the interests of [a] foreign government into account" in deciding whether to retain jurisdiction. *Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 804 (9th Cir. 2001). The Delaware Supreme Court and the Ninth Circuit are in direct conflict with other jurisdictions, including the Fifth and Eleventh Circuits, and the Illinois Supreme Court. In *Torres* v. *S. Peru Copper Corp.*, 113 F.3d 540, 542-43 (5th Cir. 1997), the Fifth Circuit declined to exercise jurisdiction over a dispute that implicated "Peru's sovereign interests by seeking damages for activities in which the government actively has been engaged." *Id.* at 543. The Eleventh Circuit likewise acknowledged that foreign sovereign interests are "significant" in determining whether to retain jurisdiction over a dispute implicating those interests. *Pacheco de Perez* v. *AT&T Co.*, 139 F.3d 1368, 1378 (11th Cir. 1998); cf. Pet. App. at 115a (describing the Republic of Argentina's "utmost interest that legal questions arising within the framework of the [Hydrocarbon Law] . . ., between the licensees of hydrocarbon and the owners of the surface realty be dealt with in conformity with Argentine law and before the Courts of the Argentine Republic"). Consistent with these approaches, the Illinois Supreme Court takes into account foreign sovereign interests to avoid "'an inappropriate usurpation of a foreign court's proper authority to decide a matter of local interest.'" *Jones* v. *Searles Labs.*, 444 N.E.2d 157, 161 (Ill. 1982). This Court's intervention to provide clarity on this important question of federal law is imperative.

2. The petition also described the Republic of Argentina's crucial sovereign interests in this case, which were expressed by notifying the United States State Department and the Argentine Supreme Court of Argentina's paramount role as owner and manager of the country's oil and gas reserves. See Pet. App. 48a-72a, 115a-116a. The petition further

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decision on an underlying issue of state law, the practice in federal courts has been, when necessary, to decide both issues").

demonstrated how the infringement on Argentine sovereignty is especially severe in this case, where respondents' lawsuit seeks to displace Argentina's carefully prescribed regulatory scheme with "international standards for forest engineering" to govern the legal relationship between hydrocarbon concessionaires and surface owners. *Id.* at 153a.

Respondents try to discredit this analysis by claiming that the Republic of Argentina was unaware that they had withdrawn most of their claims for equitable relief, and its concerns were limited to the effect of injunctions. Opp. 2. Respondents do not even answer the showing in the petition that one of the principal considerations of the Republic of Argentina was the need to maintain the exclusive jurisdiction of the Argentine courts over damages remedies. Pet. 23a. In any event, respondents' argument is laid to rest by the Republic's amicus brief in support of the petition. The Republic of Argentina has informed this Court, in unequivocal terms, that in its current posture "this case . . . threatens [its] sovereign interest in developing and regulating its natural resources," and in implementing "a comprehensive regime regulating and harmonizing the competing interests of surface property owners (such as Respondents) and holders of rights to extract subsurface hydrocarbons (such as Petitioner)," Amicus Br. 1, as well as its revenues from federally owned petroleum resources, *id.* at 5. The Republic notes that the foreign relations of the United States are implicated when state power threatens "a coordinate sovereign's control over a matter crucial to its sovereignty," such as natural resource development, and "[f]oreign nations cannot easily tolerate a regime in which their critical interests are subjected to the regulation of fifty different states." *Id.* at 4. Argentina looks to this Court as "the only American tribunal capable of remedying such divergences" among the states. *Id.* And none of Argentina's concerns is obviated by respondents' withdrawal of certain (but not all) of its claims for equitable

relief, since "[c]ourts shape conduct through damages awards just as surely as they do through injunctions." *Id.* at 6 n.2.

The rule endorsed by the court below, if permitted to stand, sets a dangerous precedent. As respondents note, "Delaware is the state of incorporation for many major United States corporations, and also for many companies operating principally abroad." Opp. 11. That is precisely the problem. Given the vast number of corporations that are incorporated in Delaware, and more still that are subject to personal jurisdiction in Delaware, a foreign plaintiff will have essentially carte blanche to bring any foreign dispute into the Delaware courts. Under the ruling below, no matter the significance of the foreign interests to be litigated, the state court necessarily must exercise jurisdiction unless the defendant can prove overwhelming hardship from litigating in Delaware. Pet. App. 15a. Indeed, far from downplaying this risk, respondents advertise it. See Opp. 12 (citing the Delaware courts' "readiness to hear disputes").

From the perspective of this Nation, needful of maintaining harmony with its fellow nations, this expansive state jurisdictional rule is intolerable. It is not a question solely of whether a state court can properly apply Argentine law, understand translations of foreign witnesses, and accurately resolve disputes (although there are intrinsic difficulties with state court jurisdiction in each of those respects). It is also a question of whether foreign nations will take offense at American state governments assuming the power to decide foreign disputes that are fundamental to their sovereign interests. This Court must be vigilant to ensure that state courts do not exercise jurisdiction in a manner that jeopardizes national foreign relations.

CONCLUSION

For these reasons, and those set forth in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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